Office - Supreme Court, U.S.
FILED
OCT 26 1982
ALEXANDER L. STEVAS
CLERK

No. 82-540

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

STATE OF MISSISSIPPI,

Appellant,

v.

WILLIAM FRENCH SMITH, Attorney General, *et al.*,

and

HENRY J. KIRKSEY, *et al.*,

Appellees.

On Appeal from the United States District Court
for the District of Columbia

MOTION TO DISMISS OR AFFIRM ON BEHALF OF HENRY J. KIRKSEY, ET AL.

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for
Henry J. Kirksey, et al.,
Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINION BELOW	2
STATEMENT OF THE CASE	2
ARGUMENT	8
I. THIS COURT LACKS JURISDICTION OF THIS APPEAL BECAUSE A DISTRICT COURT ORDER DENYING A MOTION FOR PARTIAL SUMMARY JUDGMENT IS NOT AN APPEALABLE ORDER	8
II. ALTERNATIVELY, THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW	10
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Allen v. *State Board of Elections*, 393 U.S. 544 (1969)	3, 8
Beer v. *United States*, 425 U.S. 130 (1976)	6, 11, 12
City of Richmond v. *United States*, 422 U.S. 358 (1975)	11
City of Rome v. *United States*, 446 U.S. 156 (1980)	3
Connor v. *Finch*, 431 U.S. 407 (1977)	4, 10
Connor v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court), *aff'd mem.*, 386 U.S. 483 (1967)	3
Connor v. *Waller*, 421 U.S. 656 (1975)	4, 10
Gillespie v. *United Steel Corp.*, 379 U.S. 148 (1964)	9
Goldstein v. *Cox*, 396 U.S. 471 (1970)	8
Hathorn v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824 (1982)	4, 10
Jordan v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeals pending*, Nos. 82-233, 82-413	5, 7
Katzenbach v. *Morgan*, 384 U.S. 641 (1966)	8
McDaniel v. *Sanchez*, 452 U.S. 130 (1981)	4, 10
Mississippi v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980)	7, *passim*
Morris v. *Gressette*, 432 U.S. 490 (1977)	11
NAACP v. *New York*, 413 U.S. 345 (1973)	9
Phillips v. *United States*, 312 U.S. 246 (1941)	8
Switzerland Cheese Assn. v. *E. Horne's Market*, 385 U.S. 23 (1966)	8
United States v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977)	4, 10
United States v. *Mississippi*, 380 U.S. 128 (1965)	2
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)	7

Other Authorities	
28 U.S.C. § 1253	8
28 U.S.C. § 1291	8
28 U.S.C. § 1292	8

TABLE OF AUTHORITIES—Continued

	Page
Federal Rules of Civil Procedure, Rule 54(b)	8
6 J. Moore, *Moore's Federal Practice* (1982)	8
(Jackson) *Clarion-Ledger*, August 18, 1982	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-540

STATE OF MISSISSIPPI,

Appellant,

v.

WILLIAM FRENCH SMITH, Attorney General, *et al.*,

and

HENRY J. KIRKSEY, *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO DISMISS OR AFFIRM ON BEHALF OF HENRY J. KIRKSEY, ET AL.

Henry J. Kirksey, et al., defendants-intervenors below, move the Court pursuant to Sup. Ct. Rule 16 to dismiss this appeal for lack of jurisdiction of an appeal from an interlocutory order or, in the alternative, to affirm for the reason that the questions presented are so unsubstantial as not to need further argument.[1]

---

[1] This motion to dismiss or affirm is being filed on behalf of state Senator Henry J. Kirksey, a black member of the Mississippi Legislature, and Owen H. Brooks, Sarah H. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, black residents and registered voters of the Mississippi Delta who are adversely affected by the 1981 "least change" congressional redistricting plan, and who were granted leave to intervene in this action by the District Court. Order Granting Leave to Intervene of April 16, 1982.

OPINION BELOW

The District Court's decision is now reported at 541 F. Supp. 1329 (D.D.C. 1982) (three-judge court).

STATEMENT OF THE CASE

This is an interlocutory appeal from an interlocutory decision of a three-judge District Court denying the State of Mississippi's motion for partial summary judgment and motion *in limine* to exclude evidence of purposeful discrimination in Mississippi congressional redistricting.

From the late nineteenth century until 1966, the Mississippi Legislature preserved the Delta region of the state intact within a single congressional district, despite numerous revisions of other districts required by changes in population or political considerations over this period. 541 F. Supp. at 1330. The Delta, in the northwest portion of Mississippi, is a distinct geographical and cultural region which historically has been heavily black. *Id.* Although black citizens had a potential electoral majority in this historic Delta district, they had no electoral influence prior to 1965 because of Mississippi's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965).

Then, in 1966, just as Mississippi's discriminatory literacy test and poll tax were outlawed by the Voting Rights Act of 1965, and just as blacks were beginning to register and vote, the state legislature redrew the boundaries of Mississippi's five congressional districts. The majority black Delta district, the lines of which ran north and south, was carved up among three new districts, the boundaries of which ran horizontally across the state from east to west, thus dismembering the black population concentration in the Delta and diluting black voting strength. All five new districts were majority white in voting age population. 541 F. Supp. at 1331.

Both congressional redistricting plans enacted by the Mississippi Legislature since 1966, the 1972 plan and the 1981 "least change" plan, followed this same basic pattern of fragmenting the black population concentration in the Delta and diluting black voting strength. News accounts of these redistrictings, which Mississippi has stipulated to be the only available accounts of the legislative debate on these plans,[2] show that these plans were racially motivated.[3]

In 1966 a Mississippi three-judge District Court, addressing primarily the question of whether the 1966 plan met one-person, one-vote requirements, ruled that black voter plaintiffs in that case failed to sustain their claim that the 1966 plan was racially motivated, finding only that "the solemn acts of the Congress or of State legislatures may not be impeached or invalidated on nothing more than newspaper reports." *Connor* v. *Johnson*, 279 F. Supp. 619, 623-24 (S.D. Miss. 1966), *aff'd mem.*, 386 U.S. 483 (1967). The District Court did not specifically make a determination that the 1966 plan did not have a racially discriminatory effect,[4] and did not apply the Section 5, Voting Rights Act, standard under which the state would have had the burden of proving that the plan was not discriminatory in purpose or effect.[5] Although *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), which held that Section 5 reaches any change which alters a covered state's election law "in even a minor way" (393 U.S. at 566) and which specifically addressed reapportionment plans (*id.* at 564-65, 569), held that such a plan was covered by Section 5, the 1966 con-

---

[2] First Set of Stipulations, filed April 30, 1982, p. 8, ¶ 32.

[3] This evidence is summarized in *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, pp. 16-23.

[4] The statement in the Jurisdictional Statement, p. 3, that the *Connor* court found that the 1966 plan did not have a racially discriminatory effect is erroneous.

[5] *City of Rome* v. *United States*, 446 U.S. 156, 172 (1980).

gressional redistricting plan was never submitted for Section 5 review by either the Attorney General or the District Court for the District of Columbia. 541 F. Supp. at 1331.

Subsequent decisions of this court have made it clear that the *Connor* court lacked jurisdiction to approve the 1966 plan because legislatively-enacted reapportionment plans are not "effective as laws until and unless cleared pursuant to § 5," and District Courts err in deciding constitutional challenges to state laws based upon claims of racial discrimination prior to Section 5 preclearance. *Connor* v. *Waller*, 421 U.S. 656 (1975).[6]

The 1972 plan, which also divided the Delta and created five majority white districts, was submitted to the Attorney General for Section 5 preclearance. Under the Justice Department policy then in effect, the Attorney General deferred to the decision of the *Connor* court approving the 1966 plan and did not object to the 1972 plan. 541 F. Supp. at 1331. The Attorney General did not apply the proper Section 5 standard to determine whether the state had met its burden of proving that the 1972 plan was not enacted for a discriminatory purpose and did not have a discriminatory effect. *Id.* Subsequent decisions of this Court have established that the 1972 plan was reviewed by the Attorney General under an erroneous legal standard, and that Section 5 preclearance rules are applicable even where a local District Court exceeds its jurisdiction and determines that the plan meets constitutional standards. See *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, *supra*.

In 1981 the Mississippi Legislature rejected proposals for restoring a majority black Delta district, and adhered to its discriminatory policy of splitting up the Delta and

---

[6] See also, *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 836-37 (1982); *McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Finch*, 431 U.S. 407, 412 (1977); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642, 645 (1977).

creating five majority white districts. 541 F. Supp. at 1332. When the 1981 plan was submitted for Section 5 preclearance, the Attorney General entered a timely Section 5 objection. The Attorney General found that while the state was under no obligation to maximize minority voting strength, the Justice Department had received complaints that alternate plans creating a majority black district "were rejected for racially discriminatory reasons," and the fragmentation and dilution of black voting strength in the Delta "suggests to us an unnecessary retrogression in the position of black voters in Mississippi." [7]

Following the Attorney General's Section 5 objection, a three-judge District Court in Mississippi enjoined implementation of the 1981 "least change" plan because it had not been precleared under Section 5, found the preexisting congressional districts unconstitutionally malapportioned, and ordered into effect an interim court-ordered congressional redistricting plan. *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeals pending*, Nos. 82-233, 82-413. The court-ordered plan puts the Delta counties back together in a single district, District 2, which is 53.77% black in population, *id.* at 1141. In the August 17, 1982 Democratic primary, a black candidate, state Rep. Robert G. Clark, defeated three white candidates to win the Democratic nomination for the U.S. House of Representatives in that district.[8] Clark faces a white Republican nominee in the November general election.[9]

---

[7] Section 5 objection letter from William Bradford Reynolds, Assistant Attorney General in charge of the Civil Rights Division, U.S. Department of Justice to Jerris Leonard, March 30, 1982. This Section 5 objection letter is not included in the appendix to the Jurisdictional Statement in this appeal, but may be found in *Brooks* v. *Winter*, No. 82-233, Jurisdictional Statement, Appendix B, pp. 25a-29a.

[8] (Jackson) *Clarion-Ledger*, August 18, 1982, p. 1A.

[9] *Id.*

The State of Mississippi filed this action on April 7, 1982, to overturn the Attorney General's Section 5 objection to the Mississippi Legislature's 1981 "least change" plan. Mississippi seeks a declaratory judgment that this plan, Miss. Laws, 1981 Extra. Sess., ch. 8 (hereinafter sometimes cited as "least change" plan), was not enacted for a racially discriminatory purpose and would not have a racially discriminatory effect. Mississippi then filed two motions: (1) a motion for partial summary judgment seeking a declaration from the District Court for the District of Columbia that either the 1972 plan or the 1966 plan should be used as the benchmark for measuring whether the 1981 plan was retrogressive of black voting strength, and therefore the 1981 plan should be found not to have a discriminatory effect under *Beer* v. *United States*, 425 U.S. 130, 141 (1976);[10] and (2) a motion *in limine* seeking an interlocutory ruling from the District Court that any proof of racially discriminatory purpose behind the 1966 and 1972 legislatively-enacted congressional redistricting plans, upon which the 1981 plan was based, should be excluded from evidence at trial. The state did not seek summary judgment on the issue of whether the 1981 plan was motivated by a racially discriminatory purpose.

The District Court denied both motions. The court held that because neither the 1966 plan nor the 1972 plan had been subjected to proper Section 5 review based on Section 5 statutory standards,

> It is very doubtful that an apportionment plan never reviewed on the merits under Section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for

[10] "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."

> the purpose of measuring the possible discriminatory effect of subsequent plans.
>
> * * *
>
> Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing.

541 F. Supp. at 1332-33. The court then applied the teachings of *Mississippi* v. *United States*, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980), to hold that for purposes of determining whether the "least change" plan has a discriminatory effect, the *Jordon* v. *Winter* court-ordered plan must now be considered the existing plan against which the "least change" plan should be measured to determine whether or not it has a retrogressive effect. But the District Court deferred "any definitive resolution" of the question of whether either the 1972 or the 1966 plans could be used as benchmarks for measuring the effect of the 1981 plan "pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan." 541 F. Supp. at 1333.

> If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing right to seek approval of any plan under Section 5 at any time must be fully recognized.

Id. No such trial has yet been held.

The District Court also denied Mississippi's evidentiary motion for the reason that the historical background and sequence of events leading up to the enactment of the 1981 plan, under *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977), are relevant to assessing whether the 1981 plan was enacted for a discriminatory purpose. *Id.*

ARGUMENT

I. THIS COURT LACKS JURISDICTION OF THIS APPEAL BECAUSE A DISTRICT COURT ORDER DENYING A MOTION FOR PARTIAL SUMMARY JUDGMENT IS NOT AN APPEALABLE ORDER.

Since *Goldstein* v. *Cox*, 396 U.S. 471 (1970), and *Switzerland Cheese Assn.* v. *E. Horne's Market*, 385 U.S. 23 (1966), it has been well established that this Court lacks appellate jurisdiction over denials of motions for summary judgment. See 6 J. Moore, *Moore's Federal Practice*, ¶ 56.21[2], pp. 56-1275-86 (1982). In numerous cases, this Court has stated that its jurisdiction of appeals from three-judge District Courts "is to be narrowly construed since 'any loose construction of the requirements of [the three-judge court act] would defeat the purposes of Congress . . . to keep within narrow confines our appellate docket.'" *Goldstein* v. *Cox*, *supra*, 396 U.S. at 478, *quoting Phillips* v. *United States*, 312 U.S. 246, 250 (1941); see *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 561-62. Mississippi's appeal in this case violates the congressional policy against piecemeal appeals, and if allowed would open "a floodgate" of review of pretrial orders. *Switzerland Cheese Assn.* v. *E. Horne's Market*, *supra*, 385 U.S. at 24.

Where a summary adjudication is made in a civil action over which this Court has appellate jurisdiction by direct appeal from the District Court, appealability of the order is governed by statutes applicable to direct appeal. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); 6 J. Moore, *Moore's Federal Practice*, *supra*, ¶ 56.21 [1.—1], p. 56-1265. No statute authorizes this appeal. It is not authorized by 28 U.S.C. §§ 1253, 1291, or 1292 (a) or (b) or Rule 54(b), Fed. R. Civ. P., because the decision below is not a final decision, the District Court did not grant or deny a preliminary or permanent injunction (no injunctive relief has been sought in this declaratory judgment action), and the District Court was

not requested to certify this appeal as involving a controlling question of law.

The only possible exception to this rule, that carved out in *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), clearly is not applicable here. Mississippi can make no claim (and does not in its Jurisdictional Statement) that the issues presented in this appeal are severable from the main action, or that the state's rights would be denied or substantially prejudiced if this appeal were denied. The District Court in its ruling did not resolve the factual issues of whether or not the 1981 "least change" plan has a retrogressive effect compared with the court-ordered plan or the 1972 or 1966 plans, and promised the state a trial on these issues "at the earliest possible date." 541 F. Supp. at 1333. The District Court has made it clear that the issues presented in this appeal will be fully preserved to the state pending final adjudication, and once the District Court has rendered final judgment, these issues will be ripe for determination by this Court on any subsequent appeal. There are also issues which the plaintiff has not yet presented to the District Court for resolution, such as the issue of whether plaintiff can demonstrate that the "least change" plan was not enacted for a racially discriminatory purpose. All these issues remain in the District Court, in the first instance, for final determination.

The only case cited by appellant, *NAACP* v. *New York*, 413 U.S. 345 (1973), is inapposite. There the District Court entered an order denying appellants' motion to intervene, and entered a summary judgment, agreed to by the United States, allowing New York City to bail out from under Section 5 and the other temporary enforcement provisions of the Voting Rights Act. Unlike this case, the denial of intervention there forever cut off any claims that the intervenors might have in resisting New York City's bailout action.

For similar reasons, the denial of the motion *in limine* also is a nonappealable order. The appeal is not authorized by any statute, and allowing this appeal would open up a floodgate of immediate interlocutory appeals by Section 5 plaintiffs from any District Court ruling—including rulings rendered during a trial—on any evidentiary issue which went against the plaintiff.

For these reasons, this Court should dismiss this interlocutory appeal for lack of jurisdiction.

II. ALTERNATIVELY, THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THIS APPEAL PRESENTS NO SUBSTANTIAL QUESTION FOR REVIEW.

The District Court's refusal to defer to the 1966 District Court decision in *Connor* is consistent with this Court's numerous decisions holding that "a District Court's conclusion that a reapportionment plan proposed by a covered jurisdiction complies with constitutional requirements is not a substitute for § 5 review." *McDaniel* v. *Sanchez*, *supra*, 452 U.S. at 150 n. 31, discussing *United States* v. *Board of Supervisors of Warren County, Mississippi*, *supra*; also, *Hathorn* v. *Lavorn*, *supra*; *Connor* v. *Finch*, *supra*; *Connor* v. *Waller*, *supra*. Based on these decisions of this Court, the Attorney General's 1972 non-objection letter also was based on a patently erroneous legal standard, and therefore is not binding on the District Court for the District of Columbia in reviewing the 1981 "least change" plan. The 1972 non-objection presents a unique situation which is not likely to recur, and therefore does not merit plenary consideration by this Court. The Justice Department policy of deferring to local District Court determinations of constitutionality in Section 5 review has long since been abolished, and the Attorney General has now recog-

nized his statutory responsibility to review Section 5 submissions on their merits.[11]

Morris v. *Gressette*, 432 U.S. 490 (1977), is inapplicable here. There, as distinguished from this case, minority voters sought direct judicial review of the Attorney General's failure to object to a Section 5 submission, and that decision was based entirely on this Court's view that Congress did not intend that the Attorney General's Section 5 preclearance period should be extended beyond the time period provided in the statute. 432 U.S. at 504-05. There is nothing in that decision which holds that the District Court for the District of Columbia, in a *de novo* proceeding brought by a covered jurisdiction, is bound by a prior Section 5 determination issued by the Attorney General ten years earlier under a facially erroneous legal interpretation which has since been repudiated by numerous decisions of this Court.

The District Court's determination to use the court-ordered plan as the present benchmark for determining discriminatory effect in the 1981 "least change" plan was controlled by *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979) (three-judge court), *aff'd mem.*, 444 U.S. 1050 (1980). This Court in *Beer* v. *United States*, *supra*, construed Section 5 to protect "*present* levels of voting effectiveness for the black population" from being diminished. 425 U.S. at 141 n.12, *quoting City of Richmond* v. *United States*, 422 U.S. 358, 388 (Brennan, J., dissenting). Since the court-ordered plan is the plan presently in effect for Mississippi congressional elections, that is the benchmark by which any retrogressive effect should be measured. *Mississippi* v. *United States* also holds that whether or not a new plan is retrogressive of existing levels of black voting strength

---

[11] See Section 5 objection letter, *Brooks* v. *Winter*, *supra*, Jurisdictional Statement, Appendix B, pp. 25a-29a.

should not be determined on the basis of prior plans tainted by racial discrimination, in that case, the prior legislative reapportionment plans which "had failed to meet constitutional requirements and had been marked by the racially discriminatory use of multi-member districts." 490 F. Supp. at 575. Here, as the Attorney General determined in his Section 5 objection, the 1972 and 1966 Mississippi congressional redistricting plans had gerrymandered black voting strength by slicing up the heavily black Delta area.

The facts of this case are even stronger than those presented in *Mississippi* v. *United States*. In that case the court-ordered plan used by the District Court as the benchmark for measuring present retrogression had never been used in an election. Here, the court-ordered plan has already been used in the August 17 party primaries, and is scheduled to be used in the November 2 general election. The state's position that the 1972 and 1966 plans should be used to determine discriminatory effect would truly be retrogressive, because it would deprive black state Rep. Robert G. Clark of his Democratic primary victory, and, if he wins in the general election, would oust from office the first black member of Congress elected from Mississippi since 1886. Whether or not Mississippi was justified in relying on its legal interpretation that perpetuating the 1966 gerrymander or the 1972 gerrymander would assure Section 5 preclearance is immaterial. Whatever weight the District Court may give this reliance interest in determining whether or not the 1981 plan was motivated by a discriminatory purpose, it surely is not relevant to a determination whether the "least change" plan has the present discriminatory effect prohibited by Section 5 as construed in *Beer*.

Appellants' contentions fail to present a substantial question meriting plenary review by this Court.

CONCLUSION

For the reasons stated herein, this Court should dismiss this appeal for lack of jurisdiction, or alternatively, affirm.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th Street, N.W.
Suite 520
Washington, D.C. 20005
(202) 628-6700

Attorneys for
Henry J. Kirksey, et al.,
Appellees

* Counsel of Record